89-1798

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSEPH ANTHONY FAUSTO,
Petitioner

- v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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May 1990

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QUESTION PRESENTED

Whether "a suit for back[]pay will lie" (*United States v. Fausto*, 484 U.S. 439, 454 (1988)) in the Claims Court under the Tucker Act for an employee of an agency who is not within the meaning of the Civil Service Reform Act of 1978 but who is protected by the Back Pay Act so that he may enforce his right to back pay in respect of a major adverse personnel action that *has been determined* by his employing agency to have been unjustified or unwarranted.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Joseph Anthony Fausto, a layman appearing *pro se*, herewith petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is unreported. The opinion of the Claims Court (App., *infra*, 5a-7a) is also unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 4a) was entered on January 19, 1990. On April 10, 1990, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari

to and including May 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in App., *infra*, 17a-20a.

STATEMENT

Petitioner Joseph Anthony Fausto, a career tenured "employee of an agency" (5 U.S.C. § 5596(b)(1); App., *infra*, 17a) was removed from his position in the excepted service on January 16, 1981 by the United States Department of the Interior (respondent) without citation to any "civil service or other legal authority" (App., *infra*, 9a-10a). After the passage of over two years, on February 1, 1983, respondent issued an official notice of personnel action that it had found under "applicable law" (5 U.S.C. § 5596(b)(1); App., *infra*, 17a), *i.e.*, administrative grievance regulations authorized by the Civil Service Reform Act of 1978 (CSRA), at 5 U.S.C § 75 (App., *infra*, 11a), that petitioner's removal was unwarranted, and that same was thereby cancelled under the legal authority of the Back Pay Act, at 5 U.S.C. § 5596 (App., *infra*, 11a-12a). However, respondent paid petitioner back pay for only *part* of the period defined by the Back Pay Act by subjecting him to a constructive suspension (App., *infra*, 13a-14a) and to a constructive removal (App., *infra*, 15a-16a) effective *nunc pro tunc* "during the period" (5 U.S.C. § 5596(b)(1)(A)(i); App., *infra*, 18a) for which petitioner was to be deemed "for all purposes . . . to have performed service for the [respondent] agency" (5 U.S.C. § 5596(b)(1)(B); App., *infra*, 18a).

Thereupon, the petitioner, a layman proceeding *pro se*, filed a complaint in the United States Claims Court. Petitioner premised jurisdiction on that portion of the Tucker Act, at 28 U.S.C. § 1491(a)(1), which provides in pertinent part that the Claims Court "shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon . . . any Act of Congress" (App., *infra*, 17a). The "Act of Congress" upon which petitioner relied was that portion of the Back Pay Act, at 5 U.S.C. § 5596(b)(1), which provides in pertinent part that "[a]n employee of an agency who . . . is found by appropriate authority under applicable law . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal . . . of all . . . of the pay . . . of the employee . . . is entitled, on correction of the personnel action [App., *infra*, 11a-12a], to receive for the period for which the personnel action was in effect [January 16, 1981 through February 1, 1983; App., *infra*, 9a; 12a] . . . an amount equal to all . . . of the pay . . . which the employee normally would have earned or received during the period if the personnel action had not occurred . . . and . . . for all purposes, is deemed to have performed service for the agency during that period" (App., *infra*, 17a-18a).

Notwithstanding that petitioner had sought *no* judicial review of the *merits* of any personnel action taken against him by respondent, the Claims Court dismissed the complaint for lack of jurisdiction. In an opinion that made no reference whatsoever to the Tucker Act, the Claims Court held that the CSRA "establishes so comprehensive a scheme for review of federal employee personnel actions as to preclude jurisdiction in this court under the Back Pay Act"

(*Fausto v. United States*, 7 Cl.Ct. 459 (1985)). Subsequently, the Court of Appeals for the Federal Circuit reversed. United States Circuit Judge Jean Galloway Bissell, writing for a unanimous panel, held that, as petitioner invoked a right grounded in a regulation of an executive department (authorized by 5 U.S.C. § 75; App., *infra*, 11a) as required by the Tucker Act and a money-mandating pay statute (5 U.S.C. § 5596; App., *infra*, 11a) applied to him, "this case merely recognizes the remedy under the Tucker Act and the Back Pay Act which Congress created many years ago" (*Fausto v. United States*, 783 F.2d 1020, 1023 (1986)). With regard to petitioner's claim that he was not made whole under the Back Pay Act, the Federal Circuit noted that where, as here, an unlawful administrative action deprived petitioner of a procedural right, such action was *void ab initio* and therefore "leaves the employee entitled to his pay otherwise due *until* proper procedural steps are taken" (*id.*) to separate him, and that, because respondent delayed beyond a short and reasonable period of time before offering to correct its procedural error, "the agency no longer had the opportunity to correct the procedural error retroactively [such that this petitioner] 'in effect was never separated and never stopped drawing his pay' [citation omitted]" (783 F.2d at 1024). Later, the Federal Circuit unanimously denied the government's petition for rehearing, observing that "[t]he basis for the Tucker Act suit here is not the grievance regulation [authorized by the CSRA, at 5 U.S.C. § 75; App., *infra*, 11a] but the Back Pay Act [which statute] 'was intended to grant a monetary cause of action' [*United States v. Testan*, 424 U.S. 392, 407 (1976)]" (*Fausto v. United States*, 791 F.2d 1554, 1556 (1986)). It was therein stressed that this

Court recognized, in *Bush v. Lucas*, 462 U.S. 367, 385 (1983), that one component of the " 'comprehensive scheme' " which protects federal employees such as petitioner from arbitrary action by providing administrative and judicial procedures under " 'which improper action may be redressed' " is the Back Pay Act, which this Court described as " 'extending the right to back[]pay and lost benefits to every employee affected by a personnel action subsequently found to be unjustified' [462 U.S. at 385, n. 25]" (*Fausto v. United States*, 791 F.2d at 1559). Thus, the Federal Circuit concluded that, because "[i]n the Tucker Act and the Back Pay Act, Congress provided a remedy for a federal employee whose agency admittedly did not comply with its own regulation in removing him . . . [t]he court is not free to dismantle what Congress has so carefully constructed" (791 F.2d at 1560).

Notwithstanding that the Federal Circuit had squarely held that this petitioner "ma[de] no claim of entitlement under the CSRA and [refused to] resolve that issue in this case" (791 F.2d at 1557), this Court granted a writ of certiorari (479 U.S. 1029 (1987)) to review the question presented by the government of whether enactment of the CSRA precluded Tucker Act review of the merits of adverse personnel actions by employees similarly situated to this petitioner, *i.e.*, individuals *not* covered by the CSRA, but nevertheless subjected to "admittedly" (*Fausto v. United States*, 791 F.2d at 1560) unwarranted personnel actions and, like petitioner here, "protected by the Back Pay Act" (791 F.2d at 1559). Apparently recognizing the *hypothetical* nature of the question then presented to this Court, the government conceded that its "petition raised only the

question whether [this petitioner] could obtain judicial review [of the merits of an adverse personnel action taken against him] under the Tucker Act and did not challenge the court of appeals' conclusion that, under the facts of this case, the Department of the Interior [respondent agency herein] did not correctly resolve the merits of [petitioner's] claim [that he was not made whole under the Back Pay Act]" (Brief for the United States, *United States v. Fausto*, No. 86-595, at 6, n. 6). Subsequently, the government affirmed to this Court that "[t]his case does *not* present the question whether an employee [such as petitioner herein] may bring suit to enforce his right to back pay in respect of a personnel action that *has been determined* [by an agency such as respondent herein] to have been unjustified or unwarranted" (Reply Brief for the United States, *United States v. Fausto*, No. 86-595, at 4-5, n. 3). At argument, *amicus* inadvertently agreed with this Court's assumption that this petitioner did *not* need *any* court review to establish whether he was made whole under the Back Pay Act (Tr. 40).

Even though this Court recognized the facts (1) that the notice issued by respondent herein to petitioner that he would be removed January 16, 1981 "did not advise [him] of his grievance rights under Department of the Interior regulations, which included the right to a formal hearing conducted by a grievance examiner" (*United States v. Fausto*, 484 U.S. 439, 441-2 (1988)), and (2) that "on June 30, 1982 [App., *infra*, 11a], [respondent herein] concluded based on the administrative file and without a hearing, that [petitioner] should not have been removed . . . [and] offered [petitioner] back[]pay" (484 U.S. at 442), it was held that the CSRA had

repealed the Tucker Act jurisdiction of the Claims Court to "review . . . the underlying personnel decision giving rise to [a] claim for back[]pay" (484 U.S. at 435). At the same time, however, this Court reaffirmed that "a suit for back[]pay will lie" (484 U.S. at 454) for an employee *after* he is "found by appropriate authority under applicable law" (5 U.S.C. § 5596(b)(1); App., *infra*, 17a) to have undergone an uawarranted personnel action.

Prior to the expiration of the applicable statute of limitations (28 U.S.C. § 2501), petitioner filed a Tucker Act suit in the Claims Court, and emphasized that his complaint presented the precise question that the government affirmed to this Court that it was *not* deciding in *United States v. Fausto* (Reply Brief for the United States, *United States v. Fausto*, No. 86-595, at 4-5, n. 3), to wit, whether that court had Tucker Act jurisdiction to enforce his right to be made whole under the Back Pay Act *after* respondent determined that his January, 1981 removal was unwarranted. Apparently recognizing that the complaint could not be construed as an attempt to obtain Tucker Act "review . . . of the underlying personnel decision giving rise to the claim for back[]pay" (*United States v. Fausto*, 484 U.S. at 453), in which case the claim, having accrued eight years prior to the filing of the complaint, would clearly have been barred by the expiration of the six-year statute of limitations, the government filed a motion to dismiss, arguing instead that petitioner's claim was barred by the doctrine of *res judicata*. Petitioner opposed the government's motion, urging that his second Tucker Act suit was *not* barred under the authority of *Hughes v. United States*, 4 Wall. (71 U.S.) 232, 237 (1866), wherein it was held, in pertinent part, that "[i]f the first

suit was dismissed for . . . the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit [citing *Walden v. Bodley*, 14 Peters (39 U.S.) 156, 161 (1840)]."

Notwithstanding that petitioner's first suit, which culminated in this Court's decision in *United States v. Fausto*, was dismissed for lack of jurisdiction, the Claims Court dismissed in an opinion which made no reference to a *res judicata* bar. The Claims Court ruled that, "under the decision in *United States v. Fausto*, [484] U.S. [439], 108 S.Ct. 668 (1988), both the Claims Court and the Federal Circuit were held to lack jurisdiction over [petitioner's] back pay claim" (App., *infra*, 6a). From this expanded premise, which appears to interpret *United States v. Fausto* to have repealed the Back Pay Act altogether, the Claims Court proceeded to the narrow conclusion that petitioner was precluded from relitigating any "jurisdictional matters resolved by the Supreme Court" (App., *infra*, 6a) in *United States v. Fausto*, as if the complaint sought "review . . . of the underlying personnel decision giving rise to the claim for back[]pay" (484 U.S. at 453). Dismissal was based upon the erroneous proposition that petitioner was *required* to cite discrete "ruling[s]" (App., *infra*, 6a) by respondent that the constructive suspension (App., *infra*, 13a-14a) and the constructive removal (App., *infra*, 15a-16a) were unwarranted on the merits, as if both were effected after "proper procedural steps [were] taken" (*Fausto v. United States*, 783 F.2d at 1023) in accordance with the legal authorities cited by respondent (App., *infra*, 13a, 15a) in the first instance. On appeal, the Federal Circuit affirmed, but failed to resolve the contradiction that,

while respondent "did indeed determine that [petitioner] had undergone an unwarranted personnel action" (App., *infra*, 2a), respondent "at the same time [properly] determined [on February 1, 1983; App., *infra*, 14a, 16a] what personnel action[s this petitioner] *should* have undergone" (App., *infra*, 2a) in 1981, as if pure *speculation* provides a sound legal basis for determining whether "proper procedural steps [were] taken" (*Fausto v. United States*, 783 F.2d at 1023) by respondent *before* effecting adverse personnel actions against petitioner, and *even if* such adverse personnel actions were *not* effected "during the period [for which petitioner was to be deemed] for all purposes . . . to have performed service for the agency" (5 U.S.C. § 5596(b)(1); App., *infra*, 18a).

REASONS FOR GRANTING THE PETITION

> Last year's Supreme Court decision in *United States v. Fausto* makes this legislation all the more urgent. In its decision, the Supreme Court cut off an alternative method of judicial review for excepted service employees, saying that Congress, in passing the Civil Service Reform Act of 1978, had intended to deprive excepted service employees, other than those who were veterans preference eligible, of the right to challenge adverse actions. This bill explicitly provides those rights.

H.R. Rep. No. 101-328, 101st Cong., 1st Sess. 4 (1989). Enactment of H.R. 3086, entitled "Civil Service Due Process Amendments," will have the practical effect of overturning this Court's decision in *United States v. Fausto*, 484 U.S. 439 (1988). Whether or not this legislation is enacted, however, the decision below would operate to subject both the

Tucker Act and the Back Pay Act to partial judicial repeal. This Court should grant the petition to answer the important question of federal jurisdiction raised by the facts of this case.

1. This Court's opinion in *United States v. Fausto* was handed down on January 25, 1988. Eight days later, on February 2, 1988, the United States House of Representatives passed, by a vote of 365 yeas to 21 nays, legislation entitled "Civil Service Due Process Amendments" (134 Cong. Rec. 588) which would have had the effect of overturning *United States v. Fausto*. On March 15, 1990, the Director of the United States Office of Personnel Management transmitted a letter to the Subcommittee on Federal Service, Post Office, and Civil Service of the Senate Committee on Governmental Affairs which stated in effect that the President of the United States intended to withdraw his opposition to H.R. 3086 (28 *Government Employee Relations Report* 373 (1990)). On March 29, 1990, the Committee approved the legislation and submitted same to the United States Senate, where, as of April 6, 1990, a vote on the measure had not yet been scheduled (28 *GERR* 472-3).

It is plain that these developments indicate that Congress did *not* intend, as this Court implied in *United States v. Fausto*, that an individual similarly situated to petitioner be denied judicial review of his "right to back pay in respect of a personnel action that *has been determined* to have been unjustified or unwarranted" (Reply Brief for the United States, *United States v. Fausto*, No. 86-595, at 5, n. 3). This being so, it is submitted that the imminent enactment of the Civil Service Due Process Amendments suggests that the granting of this petition would be most appropriate, for in that event this

case should be remanded for an articulation of a basis other than *United States v. Fausto* for denying Tucker Act review in the Claims Court on this set of facts.

Whether or not the Civil Service Due Process Amendments are enacted by Congress, there is no dispute that this Court's holding in *United States v. Fausto* that "if an employee is found by an 'appropriate authority' to have undergone an unwarranted personnel action a suit for back[]pay will lie" (484 U.S. at 454) remains good law. There is also no dispute that this holding should apply to this petitioner. However, the decisions below, as they interpret *United States v. Fausto*, operate to divest petitioner as well as over 450,000 federal employees in the excepted service (United States Office of Personnel Management, *Federal Civilian Workforce Statistics: Employment and Trends as of January 1989*, at 84 (1989)) potentially in the same situation as petitioner of their fundamental rights to "bring suit[s] to enforce [their] right[s] to back pay in respect of . . . personnel action[s] that *ha[ve] been determined* [by their employing agencies] to have been unjustified or unwarranted" (Reply Brief for the United States, *United States v. Fausto*, No. 86-595, at 5, n. 3).

2. Although the decision below is unreported, and thus has no precedential value, it is submitted that the Federal Circuit's misapplication of the Tucker Act, the Back Pay Act, and this Court's decision in *United States v. Fausto* in this case has the potential of contributing to compounding error in the jurisprudence of that court, such that would operate to subject the misread statutes to judicial repeal as to

nearly half of a million federal employees. In view of the adverse consequences of the Federal Circuit's misinterpretations of these statutes and authority of this Court in other cases, this petition should be granted.

Even if the Civil Service Due Process Amendments are enacted, that will *not* alter the fact that the CSRA has repealed Tucker Act review in the Claims Court to review an underlying agency personnel decision giving rise to a claim for back pay (*United States v. Fausto*, 484 U.S. at 453). However, the facts of this case demonstrate conclusively that petitioner here sought no such review. It is essential to a proper understanding of this case to recognize that what petitioner has sought is precisely what the government told this Court it was *not* deciding in *United States v. Fausto*, to wit, whether he could bring a suit in the Claims Court under the Tucker Act to enforce his rights under the Back Pay Act "in respect of a personnel action that *ha*[*d*] *been determined* to have been unjustified or unwarranted [App., *infra*, 11a-12a]" (Reply Brief for the United States, *United States v. Fausto*, No. 86-595, at 5, n.3). Put another way, the Claims Court was asked neither to review a discretionary act (the agency's personnel decision to separate this petitioner) nor to perform one. The respondent agency had already made the determination that petitioner had been wrongfully removed from his position and cancelled same under the legal authority of the Back Pay Act (App., *infra*, 11a-12a). The Claims Court's *only* function in this case was to ascertain petitioner's rights which flowed from that determination, to wit, whether petitioner could *legally* be constructively suspended (App., *infra*, 13a-14a) and constructively removed (App., *infra*, 15a-

16a) by respondent "during the period [for which petitioner was to be deemed] for all purposes . . . to have performed service for the [respondent] agency" (5 U.S.C. § 5596(b)(1); App., *infra*, 18a).

It is equally important to recognize that this Court's decision in *United States v. Fausto* did *not* criticize the Federal Circuit's interpretation of *United States v. Testan*, 424 U.S. 392 (1976), to support petitioner's Tucker Act suit in the Claims Court to enforce his rights under the Back Pay Act. *Fausto v. United States*, 791 F.2d at 1555-56. Specifically, Judge Bissell found that "[t]he basis for the Tucker Act suit here is not the [agency] grievance regulation but the Back Pay Act," and because "[t]here [was] no dispute that [petitioner] ha[d] been affected by [an unwarranted] personnel action [and] the [respondent] agency ha[d] admitted as much [App., *infra*, 11a-12a] . . . [the Back Pay Act] 'was intended to grant a monetary cause of action' [*Testan*, 424 U.S. at 407]" (*Fausto v. United States*, 791 F.2d at 1556) in the Claims Court under the Tucker Act. However, when this Court reversed this judgment in *United States v. Fausto*, that amounted to a holding that the Claims Court must henceforth look elsewhere than the Back Pay Act for the basis of a Tucker Act suit, in spite of the fact that such claims were, for over a century, "a well known and major part of [its] jurisprudence" (*Fiorentino v. United States*, 221 Ct.Cl. 545, 555 (1979)). Indeed, this confusion as to the scope of the Tucker Act jurisdiction of the Claims Court over Back Pay Act claims such as that here has compelled the Federal Circuit to state in one case that "[t]he semantics of the [*United States v.*] *Fausto* opinion are not as lucid as one might have hoped to find when one seeks

to apply it to a civilian pay claim of a type obviously not in the mind of the Supreme Court" (*Hambsch v. United States*, 848 F.2d 1228, 1230 (1988)).

Last term, three Justices of this Court dissented from the denial of certiorari in *Hambsch v. United States*, 109 S.Ct. 1969 (1989), on the analogous ground that the Tucker Act suit brought therein was based *not* upon the "applicable law" (5 U.S.C. § 5596(b)(1); App., *infra*, 17a) which was *alleged* to have been violated, as the majority apparently believed, but upon the Back Pay Act. Justice O'Connor, with whom Justice Scalia and Justice Kennedy joined, wrote that petitioner therein had claimed that the Sick Leave Statute (5 U.S.C. § 6324) was an " 'applicable law' within the meaning of the Back Pay Act and that the *allegedly* [emphasis added] erroneous denial of his request for paid administrative leave was an 'unwarranted personnel action' " (*Hambsch*, 109 S.Ct. at 1970). On this basis, Justice O'Connor concluded:

> . . . [*United States v.*] *Testan* makes clear, and our subsequent cases have reaffirmed, that the Back Pay Act *itself* is an explicit consent to suit by the United States as to a claim by a federal employee that the pay or emoluments of his or her position have been wrongfully withheld in violation of an 'applicable law [or] regulation . . .' [citations omitted]. It follows that the Court of Appeals erred in searching for an explicit waiver of immunity from suit in § 6324; that explicit waiver is found in the Back Pay Act itself. The Court of Appeals' interpretation of *Testan* would render the Back Pay Act a nullity, for rarely if ever will an agency personnel regulation . . . contain an express waiver of the sovereign immunity of the United States. The

> proper inquiry is simply whether the employee *alleges* [emphasis added] the violation of a statute [or regulation] . . . which has resulted in the unlawful withholding of compensation to which he or she would otherwise be entitled.

Hambsch v. United States, 109 S.Ct. at 1971. The facts in this case are not merely analogous, however, but present a stronger, more compelling reason to grant a writ of certiorari to the Federal Circuit than did *Hambsch v. United States*.

Here, petitioner does not merely *allege* that he was subjected to an unwarranted personnel action within the meaning of the Back Pay Act, for the respondent agency issued an official cancellation order of petitioner's removal under the legal authority of the Back Pay Act (App., *infra*, 11a-12a). Clearly, this cancellation order "entitled [this petitioner] to an award of lost wages against the United States" (*Hambsch*, 109 S.Ct. at 1970) for the period January 16, 1981 through February 1, 1983 (App., *infra*, 11a-12a). But, petitioner was actually compensated for the period February 16 through September 18, 1981, after respondent imposed upon him a constructive suspension and a constructive removal (App., *infra*, 13a, 15a) effective *nunc pro tunc* "during the period [for which petitioner was to be deemed] for all purposes . . . to have performed service for the [respondent] agency" (5 U.S.C. § 5596(b)(1); App., *infra*, 18a). Thus, when the Federal Circuit ruled that respondent had *properly* "determined [on February 1, 1983; App., *infra*, 14a, 16a] what personnel action[s this petitioner] *should* have undergone" (App., *infra*, 2a) in 1981, it necessarily ignored the fact that "[t]he basis for the Tucker Act suit here [was] not [any] regulation [which *might* have provided respondent

with sufficient legal authority to take action against petitioner, provided that 'proper procedural steps were taken' (*Fausto v. United States*, 783 F.2d at 1023) prior to taking the action] but the Back Pay Act" (*Fausto v. United States*, 791 F.2d at 1556) which defined the period during which petitioner was to be deemed "for all purposes . . . to have performed service for the [respondent] agency" (5 U.S.C. § 5596(b)(1); App., *infra*, 18a) and consequently *immune*, under the plain words of the Back Pay Act, from *any* adverse personnel action taken by respondent which would result in the reduction or withdrawal of his pay "during that period" (5 U.S.C. § 5596(b)(1)(A)(i); App., *infra*, 18a). *A fortiori*, it follows that the proper inquiry is whether the employee *demonstrates* that the violation of an "applicable law [or] regulation" (5 U.S.C. § 5596(b)(1); App., *infra*, 17a) "has resulted in the unlawful withholding of compensation to which he or she would otherwise be entitled" (*Hambsch*, 109 S.Ct. at 1971). At bottom, the Federal Circuit's interpretation of *United States v. Fausto* in this case would operate to subject the Tucker Act to partial judicial repeal, for rarely if ever will an agency admit that constructive adverse personnel actions effected in conjunction with an "offer[of partial] back[]pay" (*United States v. Fausto*, 484 U.S. at 442) were "unjustified or unwarranted" (5 U.S.C. § 5596(b)(1); App., *infra*, 18a) within the meaning of an "Act of Congress" (28 U.S.C. § 1491(a)(1); App., *infra*, 17a) such that would trigger Tucker Act jurisdiction.

In the final analysis, the practical effect of the decision below would be to rewrite the Tucker Act to say what it plainly does *not* say, to wit, that the Claims Court shall have jurisdiction to render judg-

ment upon any claim against the United States founded upon any Act of Congress *with the exception of the Back Pay Act*, and that the court is *not* authorized to issue orders directing restoration to office or position or placement in appropriate duty status even where the agency "refuse[s] to reinstate a wrongfully discharged employee" (S. Rep. No. 92-1066, 92d Cong., 2d Sess. 2 (1972)). Furthermore, such a statutory construction would operate to rewrite the Back Pay Act to say what it plainly does *not* say, *i.e.*, that *only* an employee who is found by *an independent agency under the CSRA* to have undergone an unwarranted personnel action is entitled to back pay, and then *only* in an amount *committed to agency discretion by law*. It is clear beyond peradventure that Congress did not intend such anomalous results.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5001

JOSEPH A. FAUSTO,
Plaintiff-Appellant,
v.

THE UNITED STATES,
Defendant-Appellee.

Decided: January 19, 1990

Before RICH and NIES, *Circuit Judges*, and DUFF, *Judge**.

PER CURIAM.

DECISION

Plaintiff-Appellant Fausto appeals from the August 21, 1989 judgment of the United States Claims Court in case No. 30-89 C, dismissing his claim for lack of jurisdiction. We affirm.

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* Brian Barnett Duff, District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

OPINION

When the Supreme Court held that the Claims Court lacked jurisdiction to hear Fausto's claim, it specifically noted that if an "appropriate authority" determined that a government employee has "undergone an unwarranted personnel action," then "a suit for backpay will lie" (presumably in the Claims Court). *United States v. Fausto*, 484 U.S. 439, 454, *reh'g denied* 485 U.S. 972 (1988) (*Fausto*). Fausto subsequently filed the present action in the Claims Court, again seeking additional back pay based on his allegedly improper suspension and termination. The Claims Court dismissed for lack of jurisdiction, finding that no appropriate authority had found that Fausto was entitled to back pay.

On this appeal, Fausto argues that the agency, as an "appropriate authority," decided that he had "undergone an unwarranted personnel action" when it cancelled his January 16, 1981 dismissal, and thus that the Claims Court has jurisdiction to award him back pay for the period of his suspension and after his September 18, 1981 termination.

We disagree. On February 1, 1983, the agency did three things: it revoked Fausto's January 16, 1981 dismissal, it suspended him for the 30 day period from January 16 to February 15, and it terminated him effective September 18, 1981. What Fausto is asking us to do is focus solely on the first action and ignore the other two. The agency did indeed determine that Fausto had undergone an unwarranted personnel action, but at the same time it determined what personnel action he *should* have undergone. These determinations cannot be viewed separately in determining whether the Claims Court has jurisdic-

tion under the criteria set forth in *Fausto*, but instead must be looked at together to determine what the "appropriate authority decided."

In this case, the agency decided that Fausto should not have been dismissed on January 16, 1981, but should have been suspended for 30 days and then terminated on September 18, 1981. Neither the merits of this decision nor the procedure used to reach the decision are reviewable by the Claims Court or this court. *Fausto*, 484 U.S. at 455. Therefore, contrary to Fausto's allegation, no appropriate authority has determined that either the 30 day suspension or the September 18, 1981 termination was improper. Having failed to prove the allegations necessary under *Fausto* to obtain jurisdiction in the Claims Court, the Claims Court properly dismissed for lack of jurisdiction.

As a final note, the agency maintains that the frivolity of this appeal merits imposition of sanctions against Fausto. While we have found Fausto's claim to be meritless and feel that it borders on the frivolous, we are not convinced that Fausto's claim is so frivolous as to merit sanctions, and we decline the agency's suggestion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5001

JOSEPH A. FAUSTO,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Claims Court in CASE NO(S). 30-89 C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Jan. 19, 1990

COST: Against, Appellant.

PRINTING — $90.80

TOTAL — $90.80

Issued as a Mandate: February 9, 1990

APPENDIX C

IN THE UNITED STATES CLAIMS COURT

No. 30-89C

(Filed: August 18, 1989)

JOSEPH A. FAUSTO

v.

THE UNITED STATES

ORDER

Plaintiff is a former non-preference eligible employee of the United States Department of the Interior, in the excepted service, who suffered a 30-day suspension from his GS-9 level position and a removal from this position which was made effective on the date the facility where he was employed was permanently closed.

In 1983, plaintiff filed a back pay claim in this court for the 30-day suspension period and for the period subsequent to his removal. The decision of the Claims Court denying the claim, *Fausto v. United States*, 7 Cl. Ct. 459 (1985), was reversed by the Federal Circuit, *Fausto v. United States*, 783 F.2d 1020, *reh'g denied*, 791 F.2d 1554 (Fed. Cir. 1986), and this decision of the Federal Circuit was then reversed by the Supreme Court, *United States v. Fausto*, [484] U.S. [439], 108 S.Ct. 668 (1988).

The Supreme Court ruled that the Civil Service Reform Act (CSRA) established a comprehensive system for judicial review of personnel actions taken against federal employees, which review deliberately excluded employees in plaintiff's category.

Accordingly, under the decision in *United States v. Fausto*, [484] U.S. [439], 108 S.Ct. 668 (1988), both the Claims Court and the Federal Circuit were held to lack jurisdiction over plaintiff's back pay claim.

Citing language in the Supreme Court opinion that a back pay claim would remain possible in the Claims Court "if an employee is found by an 'appropriate authority' to have undergone an unwarranted personnel action * * *" (108 S.Ct. at 677), plaintiff now again seeks to litigate his claim for pay for the 30-day suspension period and the period subsequent to his removal.

However, plaintiff is clearly barred from relitigating the jurisdictional matters resolved by the Supreme Court and therefore can cite no final determination of any "appropriate authority," having jurisdiction over the matter, ruling that he is entitled to back pay for the 30-day suspension period or for any period following his removal. Under *Fausto*, the Federal Circuit has jurisdiction as an "appropriate authority" for CSRA purposes, only upon judicial review of Merit System[s] Protection Board actions. 5 U.S.C. § 7703. *See also Dept. of Treasury v. FLRA*, 873 F.2d 1467 (D.C. Cir. 1989) (applying *Fausto* to grievance proceedings). Under the Supreme Court's ruling, the prior Federal Circuit ruling on the 30-day suspension no longer has validity. No agency decision is set forth which could otherwise

form the predicate for a suit under 28 U.S.C. § 1491 on the basis that entitlement to back pay was thus established such as to support the entry of a money judgment.

Accordingly, as plaintiff has not set forth any claim within the jurisdiction of the Claims Court, it is ORDERED that final judgment shall be entered dismissing plaintiff's complaint with no costs to be assessed.[1]

/s/ James F. Merow
JAMES F. MEROW
Judge

---

[1] Plaintiff belatedly requests oral argument. Upon request, oral argument is usually scheduled. However, plaintiff's position on this claim is clear from the past litigation, the current pleadings and briefing. Plaintiff's current position approaches, if not reaches, the frivolous category. In this circumstance, no good purpose would be served in requiring that further valuable time be devoted to this matter by plaintiff, counsel and the court.

APPENDIX D

IN THE UNITED STATES CLAIMS COURT

No. 30-89 C

JOSEPH A. FAUSTO

v.

THE UNITED STATES

CORRECTED JUDGMENT

Filed Aug. 21, 1989

Pursuant to the order of August 18, 1989, directing entry of final judgment dismissing the complaint,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

FRANK T. PEARTREE
Clerk of Court

By: /s/ Linda A. Eddins
Deputy Clerk

August 21, 1989

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Filing fee is $105.00

APPENDIX E

UNITED STATES CLAIMS COURT

EXHIBIT "1" TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS—NOTIFICATION OF PERSONNEL ACTION

1. Name: Mr. Joseph A. Fausto
3. Birth Date: August 15, 1950
5. Veteran Preference: No
6. Tenure Group: 3
7. Service Computation Date: July 2, 1973
9. Federal Employees' Group Life Insurance: Waived
10. Retirement: Civil Service
12. Nature of Action: Removal
13. Effective Date: January 16, 1981
14. Civil Service or Other Legal Authority: [blank]
15. From (position title): Administrative Officer
16. Pay Plan and Occupation Code: GS-341
17a. Grade or Level: 09
17b. Step or Rate: 03
18. Salary: $19,825 [per annum]
19. Name and Location of Employing Office: United States Fish and Wildlife Service Young Adult Conservation Corps

Newton Corner, Massachusetts
Division of Refuges and Wildlife Resources
Back Bay Young Adult Conservation Corps
Camp No. 2254
Virginia Beach, Virginia

25. Duty Station: Virginia Beach, Virginia

28. Position Occupied: Excepted Service

30. Remarks: Reason: Misconduct—Falsifying official government documents, i.e., travel vouchers, time and attendance reports, report of cash funds, and unauthorized use of rental vehicles.

32. Office Maintaining Personnel Folder: U.S. Fish and Wildlife Service

33. Employing Department or Agency: Interior

34. Signature (or other authentication) and Title: /s/ Harold F. Hector, Jr., Personnel Officer

35. Date: January 16, 1981

UNITED STATES CLAIMS COURT

EXHIBIT "2" TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS—NOTIFICATION OF PERSONNEL ACTION

1. Name: Joseph A. Fausto
4. Date of Birth: August 15, 1950
5. Veteran Preference: None
6. Service Computation Date (Leave): July 2, 1973
7. Tenure: 3
8. Retirement: Civil Service
9. Federal Employees' Group Life Insurance: [waived]
14. Effective Date: January 16, 1981
16. Work Schedule: Full-time
18b. Nature of Action: Cancellation
18d. Authority: DRD-ORDER DTD 6-30-82 [sic]
18f. 5 U.S.C. [§] 5596
19b. Nature of Action [cancelled]: Removal
19d. [Original] Authority: 5 U.S.C. [§] 75
20. From: [and] 27. To: Position Title: Administrative Officer
21. [and] 28. Name and Location of Employing Office:
United States Fish and Wildlife Service

Young Adult Conservation Corps
Division of Refuges and Wildlife Resources
Back Bay Young Adult Conservation Corps Camp No. 2254
Boston, Massachusetts [sic]

22. [and] 29. Pay Plan and Occupation Code: GS-341

23. [and] 30. Grade or Level: 09

24. [and] 31. Step or Rate: 03

25. [and] 32. Salary: $19,825 per annum

34. Duty Station: Virginia Beach, Virginia

35. Position Occupied: Excepted [Service]

37. Remarks: [blank]

38a. Title of Approving Official: Personnel Officer

38b. Date: February 1, 1983

38c. Signature/Authentication of Approving Official: /s/ Harold F. Hector, Jr.

40. Employing Department or Agency: Department of the Interior

UNITED STATES CLAIMS COURT

EXHIBIT "3" TO PLANTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS—NOTIFICATION OF PERSONNEL ACTION

1. Name: Joseph A. Fausto
4. Date of Birth: August 15, 1950
5. Veteran Preference: None
6. Service Computation Date (Leave): July 2, 1973
7. Tenure: 3
8. Retirement: Civil Service
9. Federal Employees' Group Life Insurance: [waived]
14. Effective Date: January 17, 1981
16. Work Schedule: Full-time
18b. Nature of Action: Suspension not to exceed February 15, 1981
18d. Authority: 5 U.S.C. [§] 75
20. From: Position Title: Administrative Officer
21. Name and Location of Employing Office:
United States Fish and Wildlife Service
Young Adult Conservation Corps
Division of Refuges and Wildlife Resources
Back Bay Young Adult Conservation Corps
Camp No. 2254
Newton Corner, Massachusetts [sic]
22. Pay Plan and Occupation Code: GS-341

23. Grade or Level: 09

24. Step or Rate: 03

25. Salary: $19,825 per annum

34. Duty Station: Virginia Beach, Virginia

35. Position Occupied: Excepted [Service]

37. Remarks: Reason for Suspension:
For Motor Vehicle Use Violation.

38a. Title of Approving Official: Personnel Officer

38b. Date: February 1, 1983

38c. Signature/Authentication of Approving Official:
/s/ Harold F. Hector, Jr.

40. Employing Department or Agency:
Department of the Interior

UNITED STATES CLAIMS COURT

EXHIBIT "4" TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS—NOTIFICATION OF PERSONNEL ACTION

1. Name: Joseph A. Fausto
4. Date of Birth: August 15, 1950
5. Veteran Preference: None
6. Service Computation Date (Leave): July 2, 1973
7. Tenure: 3
8. Retirement: Civil Service
9. Federal Employees' Group Life Insurance: [waived]
14. Effective Date: September 18, 1981
16. Work Schedule: Full-time
18b. Nature of Action: Termination—Involuntary
18d. Authority: Regulation [5 C.F.R. §] 351.603
20. From: Position Title: Administrative Officer
21. Name and Location of Employing Office:
United States Fish and Wildlife Service
Young Adult Conservation Corps
Division of Refuges and Wildlife Resources
Back Bay Young Adult Conservation Corps
Camp No. 2254
Boston, Massachusetts [sic]
22. Pay Plan and Occupation Code: GS-341

23. Grade or Level: 09

24. Step or Rate: 04

25. Salary: $20,445 per annum

34. Duty Station: Virginia Beach, Virginia

35. Position Occupied: Excepted [Service]

37. Remarks: SF-2815, Employee Service Statement, Completed and Copy Provided to Employee 2-1-83. Not Entitled to Severance Pay . . . Lump Sum Annual Leave Payable for Accruals. . .

38a. Title of Approving Official: Personnel Officer

38b. Date: February 1, 1983

38c. Signature/Authentication of Approving Official: /s/ Harold F. Hector, Jr.

40. Employing Department or Agency: Department of the Interior

APPENDIX F

STATUTES INVOLVED

TITLE 28—UNITED STATES CODE

§ 1491. Claims against United States generally. . .

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . .

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. . .

TITLE 5—UNITED STATES CODE

§ 5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means—(1) an Executive agency. . .

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or

collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the

employee under regulations pr scribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2)(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

(B) Such interest—

(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;

(ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and

(iii) shall be compounded daily.

(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, "unfair labor practice" means an unfair labor

practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.

Supreme Court, U.S.
FILED
JUL 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1798

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH ANTHONY FAUSTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
STEPHEN J. MCHALE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Circuit and the United States Claims Court correctly concluded, in light of *United States* v. *Fausto*, 484 U.S. 439 (1988), that they lacked jurisdiction to review petitioner's renewed challenge to the adverse personnel action at issue in that prior case.

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In the Supreme Court of the United States

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No. 89-1798

JOSEPH ANTHONY FAUSTO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) and the order of the United States Claims Court (Pet. App. 5a-7a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a) was entered on January 19, 1990. On April 10, 1990, the Chief Justice granted an extension to May 19, 1990, in which to file a petition for a writ of certiorari, and the petition was filed on May 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Joseph Anthony Fausto is a former employee of the United States Fish and Wildlife Service (FWS), an agency of the United States Department of the Interior. He began work for the FWS on January 8, 1978, as an administrative officer at the Back Bay Young Adult Conservation Corps camp, located in Virginia Beach, Virginia. Petitioner's appointment was to a position in the excepted service and was for a term ending September 30, 1982, or the date the Back Bay camp closed, whichever came first. *United States* v. *Fausto*, 484 U.S. 439, 441 (1988).

On January 16, 1981, the FWS removed petitioner from his position for cause, including the misuse of a government vehicle, but failed to advise him that he could file a grievance. The FWS permanently closed the facility at which petitioner had been employed on September 18, 1981. When he subsequently was advised that he could file a grievance to contest his removal, petitioner did so. The FWS decided that it had acted improperly in removing petitioner from his position and that he should have received only a 30-day suspension. Accordingly, the FWS rescinded petitioner's removal, imposed in its place a 30-day suspension, and paid him back pay from February 15, 1981 (the date the 30-day suspension would have ended), to September 18, 1981 (the date the Back Bay camp was closed). 484 U.S. at 441-442.

2. In 1983, petitioner filed a complaint in the United States Claims Court seeking back pay for the period covered by the 30-day suspension and for the period from the date the camp closed through the date of a judgment in his favor. The Claims Court dismissed the complaint. 7 Cl. Ct. 459 (1985). The court concluded that the remedial scheme for chal-

lenging adverse actions taken against federal employees established by the Civil Service Reform Act (CSRA) provides the sole avenue for pursuing such challenges. Because the CSRA makes no provision for judicial review of adverse actions taken against non-veterans in the excepted service, a category into which petitioner falls, the Claims Court held that it had no jurisdiction to entertain his claims. 7 Cl. Ct. at 460-461.

The Claims Court ruled alternatively that petitioner would not be entitled to the relief he sought. The court held that because petitioner had occupied a position in the excepted service and had served pursuant to a term appointment, his right to back pay ended with the abolition of his position by the FWS on September 18, 1981. Additionally, the court found that the 30-day suspension was justified because petitioner did not dispute that he had misused a government vehicle and a 30-day suspension was the minimum penalty mandated by statute for that offense. See 31 U.S.C. 1349(b) (1982). Consequently, the court determined that even if it had jurisdiction to entertain his claims, petitioner would not be entitled to any back pay in addition to that which he already had been paid by the agency. 7 Cl. Ct. at 461.

The Federal Circuit reversed and remanded, holding that, notwithstanding the enactment of the CSRA, petitioner could seek review of his claim in the Claims Court. The court of appeals further held that the agency's suspension of petitioner was invalid and, therefore, that he was entitled to back pay for the period of the suspension. 783 F.2d 1020, 1023 (1986).

This Court reversed. Addressing only the jurisdictional question, the Court agreed with the Claims

Court that the enactment of the CSRA precluded judicial review of petitioner's claim. 484 U.S. at 455. The Court noted that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action." *Id.* at 444. After examining the pre-CSRA scheme for administrative and judicial review, the Court explained that Congress had "replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 445.

The Court then examined the various avenues of review provided under the CSRA and found that none of them was available to petitioner. Rather, the Court found that Congress had made an informed decision that judicial review of adverse personnel actions should not be available to non-preference eligible, excepted service employees such as petitioner. 484 U.S. at 443-451. The Court considered petitioner's contention that the Back Pay Act (5 U.S.C. 5596) provides a basis for Claims Court jurisdiction because that Act authorizes the award of back pay to an employee "found by appropriate authority * * * to have been affected by an unjustified or unwarranted personnel action." While acknowledging that in the past other courts had found jurisdiction under the Back Pay Act for suits such as petitioner's (see, *e.g.*, *Ainsworth* v. *United States*, 399 F.2d 176, 181 (Ct. Cl. 1968)), the Court held that "under the comprehensive and integrated review scheme of the CSRA, the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination." 484 U.S. at 454. Accordingly, the

Court held that the CSRA "prevents [petitioner] from seeking review in the Claims Court under the Back Pay Act." *Id.* at 455.

Petitioner sought rehearing, which was denied. 485 U.S. 972 (1988).

3. Despite this Court's determination that the Claims Court lacks jurisdiction to adjudicate his claim, petitioner filed a new complaint in the Claims Court in 1989 in which he made the same allegations that he had made previously. Thus, as the Claims Court found, he "again seeks to litigate his claim for pay for the 30-day suspension period and the period subsequent to his removal." Pet. App. 6a. The court noted that petitioner's "position approaches, if not reaches, the frivolous category." *Id.* at 7a n.1. It found that the decision of this Court was dispositive on the question of its jurisdiction to review the personnel actions disputed by petitioner and dismissed the complaint. *Id.* at 6a-7a.

The court of appeals affirmed. Pet. App. 1a-3a. The court noted that at the same time that the FWS cancelled petitioner's removal, the agency suspended him for a 30-day period and changed the effective date of his termination to the date the camp was closed. These three actions could not be viewed separately, the court held, and they were not reviewable by the Claims Court under this Court's prior decision. *Id.* at 3a. The court of appeals added that "contrary to Fausto's allegation, no appropriate authority has determined that either the 30 day suspension or the September 18, 1981 termination was improper." *Ibid.*

While the court of appeals "found Fausto's claim to be meritless and [felt] that it borders on the frivolous," the court declined the government's suggestion that it impose sanctions. Pet. App. 3a.

ARGUMENT

The unpublished decision of the court of appeals is not merely correct, but is mandated by this Court's prior decision in petitioner's case. Accordingly, further review is unwarranted.

Petitioner grounds his new complaint upon the language in this Court's opinion recognizing that "[n]ow, as previously, if an employee is found by an 'appropriate authority' to have undergone an unwarranted personnel action[,] a suit for backpay will lie." 484 U.S. at 454. According to petitioner, the FWS made such a determination when it cancelled his removal. But petitioner refuses to acknowledge that at the same time that it cancelled the removal, the agency imposed a 30-day suspension, substituted a new removal date of September 18, 1981, and awarded appropriate relief in the form of back pay for the period from the end of the 30-day suspension until the date the camp closed. Thus, petitioner has received back pay for the period for which an "appropriate authority" determined that he "had undergone an unwarranted personnel action." Pet. App. 2a. What petitioner now seeks is back pay for the period of the 30-day suspension and the period following the closing of the camp. However, as the court of appeals correctly held (*id.* at 3a), no "appropriate authority" has determined that the personnel action suspending him for 30 days and removing him effective September 18, 1981, was "unwarranted."

Moreover, it is clear that petitioner has received all the relief to which he is entitled. It is well-established that in correcting a personnel action, an agency must only place an employee in the *status*

quo ante. *Sampson* v. *Murray*, 415 U.S. 61, 75 (1974); *Boese* v. *Department of the Air Force*, 784 F.2d 386, 390 (Fed. Cir. 1986); *Kerr* v. *National Endowment for the Arts*, 726 F.2d 730, 738 (Fed. Cir. 1984). This rule is consistent with the general rule that an injured party must be placed as nearly as possible in the position he would have occupied had the wrong not been committed. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-419 (1975). In this case, when the agency cancelled petitioner's removal it placed him in precisely the position that he would have occupied had he not been removed; it suspended him for 30 days for his admitted misuse of a government vehicle as mandated by 31 U.S.C. 1349(b) (1982) and it terminated him effective September 18, 1981, the day the camp closed, because that was when his temporary appointment expired by its own terms. 7 Cl. Ct. at 460. Accordingly, as the Claims Court determined in the alternative when petitioner first commenced this action, there simply is no merit to his complaint. *Id.* at 461.

Finally, petitioner's action is barred by this Court's prior decision under *res judicata* principles. The Court held in that case that the Claims Court lacked jurisdiction to consider the claim that he has renewed by filing a new complaint in the Claims Court. The argument in his petition is merely a restatement of the argument in the rehearing petition that he filed seeking reconsideration of this Court's decision. As the Claims Court stated, petitioner "is clearly barred from relitigating the jurisdictional matters resolved by the Supreme Court." Pet. App. 6a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
STEPHEN J. MCHALE
Attorneys

JULY 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20021

Supreme Court, U.S.
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SEP 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1798

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JOSEPH ANTHONY FAUSTO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

REPLY MEMORANDUM

JOSEPH ANTHONY FAUSTO
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Appearing pro se

August 1990

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1798

JOSEPH ANTHONY FAUSTO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY MEMORANDUM

Proceeding upon the legal fiction that the petitioner, a layman appearing *pro se*, was *not* wrongfully removed from employment by the respondent agency for over two years, but was merely separated when his position was abolished, and then only *after* proper procedural steps were taken by the agency to effect such separation, including advance notice and a formal evidentiary hearing as provided in 5 C.F.R. § 351 (Pet. App. 15a), the Solicitor General adamantly insists upon mischaracterizing this case as a

"challenge to the [merits of an] adverse personnel action" (Br. in Opp. i). As a consequence, the Solicitor General fails to recognize the basic distinction that the petition attempted to draw between Tucker Act review of "the underlying personnel decision giving rise to [a] claim for back[]pay," which was barred by this Court in *United States v. Fausto*, 484 U.S. 439, 453 (1988), and Tucker Act review of a wrongfully discharged employee's "right to back pay in respect of a personnel action that *has been determined* to have been unjustified or unwarranted," which the Solicitor General declared that this Court was *not* deciding in that prior proceeding (Reply Brief for the United States, *United States v. Fausto*, No. 86-595, at 5, n. 3).

The Solicitor General posits (Br. in Opp. 6) that the petition in this case should be denied because the decision below "is not merely correct, but is mandated by this Court's prior decision in petitioner's case" inasmuch as "no 'appropriate authority' has determined that the personnel action suspending [petitioner] for 30 days and removing him effective September 18, 1981, was 'unwarranted.'" In support, the Solicitor General reminds the Court (Br. in Opp. 4), in pertinent part, that "[w]hile acknowledging that in the past other courts had found jurisdiction under the Back Pay Act for suits such as petitioner's (see, *e.g.*, *Ainsworth v. United States*, 399 F.2d 176, 181 (Ct.Cl. 1968)), the Court held that . . . the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination." It is submitted that this line of argument, although appearing persuasive, is superficial and fails to directly address the basic distinction be-

tween an agency's potential *liability* for subjecting an employee to an adverse personnel action and the scope of the *damages* to which such employee may be entitled under the Back Pay Act, 5 U.S.C. § 5596, *after* his agency has determined its own liability for effecting the underlying action in an improper manner.

The *Ainsworth* case cited by the Court in *United States v. Fausto*, 484 U.S. at 445 and 454, illustrates this principle. The opinion therein commenced with the statement (399 F.2d at 178): "This case was before us on the question of *liability* in *Ainsworth v. United States*, 180 Ct.Cl. 166 (1967), wherein we . . . held that . . . the [agency] had denied plaintiff the procedural rights to which he was entitled [emphasis added]." Thus is it clear that the former Court of Claims had *previously* determined the agency's liability (which action would now be barred by this Court's decision in *United States v. Fausto*), and was merely endeavoring, in the *Ainsworth* case cited by the Solicitor General (Br. in Opp. 4), to adjudicate the *damages* to which the employee was entitled under the Back Pay Act. Put another way, the Court of Claims did *not* then pronounce itself an "appropriate authority" to review the agency's personnel determination, but reaffirmed its historic Tucker Act jurisdiction to review the employee's "right to back pay in respect to a personnel action that *ha*[*d*] *been determined* to have been unjustified or unwarranted" (Reply Brief for the United States, *United States v. Fausto*, No. 86-595, at 5, n.3). In light of this, petitioner maintains that the decision below is *not* mandated by this Court's prior decision in his case, for there is nothing in that decision to

resolve the *different* question presented in the petition.

Nor, as the Solicitor General contends, is the decision below correct. Applying the plain words of the Back Pay Act, the Court of Claims held, in the later *Ainsworth* case cited by the Solicitor General (399 F.2d at 183):

> [T]he only relief plaintiff could have obtained if all procedural requirements had been followed would have been reassignment to a position as comparable to the one [from which he had been wrongfully removed]. Any wrongful demotion to a substitute position would give rise to a *different* cause of action. See *Newman v. United States*, 143 Ct.Cl. 784 (1958) [emphasis added].

It necessarily follows that where, as here, the agency did *not* reassign the petitioner to a comparable position but instead imposed a constructive suspension and "substituted a new removal date" (Br. in Opp. 6), such measures would give rise to a *different* cause of action. *A fortiori*, the suit which forms the basis for the petition in this case is *not* "barred by this Court's prior decision under *res judicata* principles" (Br. in Opp. 7) for it was *not* an attempt to relitigate the *one* jurisdictional matter resolved by *United States v. Fausto*, *i.e.*, "the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination" (484 U.S. at 454). Accordingly, the Claims Court retains its historic Tucker Act jurisdiction to review the *different* cause of action arising from an agency's failure to comply with the mandatory make-whole provisions of the Back Pay Act *after* it has made its own personnel determination.

It is instructive to note that the Court of Claims has observed that one of the purposes of "an *administrative agency* [personnel] decision . . . [is to] correct an action which is found to have been erroneous [and] to terminate a continuing liability" (*Ainsworth v. United States*, 399 F.2d at 181). Instead of candidly admitting that the respondent agency here unnecessarily *prolonged* its continuing liability to this petitioner, however, the Solicitor General rather grudgingly reports (Br. in Opp. 6-7) that "[i]t is well-established that in correcting a personnel action, an agency must *only* place an employee in the *status quo ante* [emphasis added]." This supposition is based in turn upon the Claims Court's "alternative[] rul[ing]" (Br. in Opp. 3) that petitioner "received all the relief to which he is entitled" (Br. in Opp. 6). Application of the facts of this case to the authorities cited by the Solicitor General would demonstrate that those authorities are fully supportive of the position urged by petitioner.

In *Boese v. Dept. of Air Force*, 784 F.2d 388, 390 (1986), the Federal Circuit held that the appellant had been "place[d] . . . as nearly as possible in the *status quo ante*" when the agency restored him to a position comparable to the one from which he was wrongfully removed "[b]ecause his former position . . . had been abolished in the interim." Here, the record indicates that, although petitioner's former position was abolished in the interim, the respondent agency made absolutely *no* efforts to even identify a comparable position to which to restore petitioner, let alone *offer* him reassignment to *any* position within its operation. Inasmuch as the ruling of the court of appeals below that the respondent agency "determined what personnel action [petitioner]

should have undergone" (Pet. App. 2a) "is purely speculative, and based on flimsy possibilities unsupported by hard facts or evidence" (*Boese*, 784 F.2d at 390), it cannot be seriously argued that petitioner was restored to the *status quo ante* within the meaning of *Boese*.

In *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (1984), the Federal Circuit observed that the wrongfully removed employee in that case declined his agency's order to return to his former position, claiming that because the agency had "shifted all the duties and responsibilities of his previously held position to another position . . . it had become a 'sham' position to which the agency wished to reinstate him" (726 F.2d at 731-2). First, the Federal Circuit succinctly pointed out that a "compliance issue is not an original 'personnel action'" (726 F.2d at 732), thus recognizing the basic distinction attempted to be drawn in the petition between judicial review of an "agency's personnel determination" (which was barred by *United States v. Fausto*, 484 U.S. at 454) and judicial review of an agency's *compliance* with its own cancellation order rendered under the legal authority of the Back Pay Act. Second, the court squarely held that "appropriate steps to enforce compliance [with a cancellation order] must include more than the formal determination that an individual was reinstated to a position bearing the same title, grade and pay—no matter what the actual content of that position may be at the time of reinstatement" (726 F.2d at 733). As it is abundantly clear that the *Kerr* court would have sternly rejected the Solicitor General's absurd argument that this petitioner was made whole within the meaning of the Back Pay Act when he was reinstated to "pre-

cisely the position that he would have occupied had he not been removed" (Br. in Opp. 7) in spite of the fact that the respondent agency *knew*, at the time of petitioner's reinstatement, that it had *abolished* that position over one year previously (Pet. App. 15a-16a), it cannot be conceivably argued that petitioner was restored to the *status quo ante* within the meaning of *Kerr*.

Writing for the majority in *Sampson v. Murray*, 415 U.S. 61, 74-5 (1974), the Chief Justice said that an agency determination that an employee was wrongfully removed "would prohibit the final separation of [the employee] unless and until proper procedures had been followed [because] Congress has provided that a wrongfully dismissed employee shall receive *full* payment and benefits for *any* time during which the employee was wrongfully discharged from employment [emphasis added]," citing the Back Pay Act, 5 U.S.C. § 5596, in the margin (415 U.S. at 75, n.31). Moreover, the Chief Justice held that the court below had erred when it relied on *FTC v. Dean Foods Co.*, 384 U.S. 597, 599-600 (1966), for the proposition that "the practical disappearance of one of the entities whose merger the Commission sought to challenge . . . would mean that the agency . . . would be incapable of implementing their statutory duties by fashioning effective relief" (415 U.S. at 77), whereas, in the case at bar, the government "strongly assert[ed] that the Back Pay Act . . . provides a complete remedy for any procedural irregularities which may have occurred in [that] case" (415 U.S. at 78, n.36). Applying these principles to the instant case yields the following analysis: First, it would seem that the Solicitor General would argue that petitioner received all of the relief to

which he was entitled under the Back Pay Act because his illegal January 16, 1981 removal was *actually* cancelled on September 18, 1981. However, the record (Pet. App. 11a-12a) reflects that the respondent agency issued the official cancellation order on February 1, 1983, thus, for the award of back pay to have been in compliance with the Back Pay Act, petitioner was entitled to retroactive salary to at least February 1, 1983, and the respondent agency was prohibited from finally separating petitioner *prospectively* "unless and until proper procedures [were] followed" (415 U.S. at 75). Second, it would seem that the Solicitor General in essence confesses an inability on the part of the respondent agency to fashion complete relief on the basis of "the practical disappearance" (415 U.S. at 77) of petitioner's former position. However, the Back Pay Act does *not* condition a wrongfully discharged employee's reinstatement upon the continuing existence of his former position, but "provides a complete remedy" (415 U.S. at 78, n.36) for such employee. Accordingly, it cannot be credibly contended that petitioner was restored to the *status quo ante* within the meaning of *Sampson v. Murray.*

Finally, the Solicitor General cites *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), for the proposition that "an injured party must be placed as nearly as possible in the position he would have occupied had the wrong not been committed" (Br. in Opp. 7). It is then asserted that this petitioner *was* placed "in precisely the position that he would have occupied had he not been removed" but that he was then constructively removed because "his temporary appointment expired by its own terms" (Br. in Opp. 7). However, the record demonstrates

that petitioner's *term* appointment was due to expire on September 30, 1982 (*Fausto v. United States*, 7 Cl.Ct. 459, 460 (1985). In view of the fact that, as of the date on which petitioner was illegally removed (January 16, 1981; Pet. App. 9a), he *still* had over a year and a half remaining on his *term* appointment, the respondent agency was obligated (1) to *award* petitioner back pay from January 17, 1981 to February 1, 1983 (the date on which his wrongful removal was cancelled; Pet. App. 12a), and (2) to *offer* petitioner a *prospective* term appointment not to exceed approximately twenty months. Only then would petitioner have been "placed as nearly as possible in the position he would have occupied had the wrong not been committed" (Br. in Opp. 7) under *Albemarle Paper Company*.

Concurring in *Albemarle Paper Company*, the Chief Justice observed that "[t]o the extent that an award of back[]pay were to be analogized to an award of damages, such an award upon proper proof would follow virtually as a matter of course from a finding that" (422 U.S. at 442) an employee had undergone an unwarranted personnel action within the meaning of the Back Pay Act, 5 U.S.C. § 5596. Although the Solicitor General does *not* dispute that the respondent agency itself made the determination that petitioner *had* undergone an unwarranted personnel action on January 16, 1981, he argues in essence that, with respect to the Back Pay Act, " '[t]he remedy of back pay . . . is entrusted to the [agency's] discretion [and] is not mechanically compelled by the Act' [*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941)]" (*Albemarle Paper Company*, 422 U.S. at 444). Where, as here, an award of back pay does *not* follow virtually as a matter of course

from a finding that an employee had undergone an unwarranted personnel action because an employing agency incorrectly believes that the remedy is entrusted to its discretion and is *not* mechanically compelled by the plain words of the Back Pay Act, it is clear beyond peradventure that the Claims Court must retain its historic Tucker Act jurisdiction to review the agency's *compliance* with the mandatory make-whole provisions of that Act *after* it has determined that the underlying personnel action was unwarranted.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case remanded for consideration of the question presented in the petition.[1]

Respectfully submitted,

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August 1990

[1] Although the Brief in Opposition is silent with respect to H.R. 3086, the "Civil Service Due Process Amendments" (Pet. 9-10), the Court's attention is now directed to the recent development that the President of the United States signed the aforementioned legislation into law on August 17, 1990 (28 *Government Employee Relations Report* 1070 (1990)). Inasmuch as the practical effect of Public Law 101-376 (*id.*) will be to diminish the continuing vitality of *United States v. Fausto*, petitioner maintains that remand of this case to the court of appeals would be appropriate.